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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

No. [redacted]
176

JOHN IKE GRIFFITH,
Petitioner

v.

BOARD OF COMMISSIONERS OF THE ALABAMA STATE BAR,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, JOHN IKE GRIFFITH, in Case Number Third Division, Number 303, Supreme Court of Alabama, prays that a writ of certiorari be issued out of and under the seal of this Court to review the judgment and opinion of the Supreme Court of Alabama, entered in the above case on February 6, 1969, which affirmed a resolution adopted by the Board of Bar Commissioners of the State of Alabama as follows:

> "BE IT RESOLVED by the Board of Commissioners of the Alabama State Bar, in executive session, having heard and considered all of the material and competent testimony introduced in the cause entitled *In the Matter of* John Ike Griffith, Attorney, that the said Board now, in executive session, and at which no one not a member of this Board is present, reached its de-

cision and conclusion that the said John Ike Griffith, having been found guilty of the charges preferred against him in this cause be and is hereby disbared." (R. p. 504).

The application of your petitioner for rehearing was denied by the Supreme Court of Alabama on March 6, 1969. (Appendix A p. 13).

OPINIONS BELOW

The opinion of the Supreme Court of Alabama (Appendix A, *infra* pp. A-1-A10) has been reported at *In The Matter of John Ike Griffith,* 219 So. 2d 357 (Alabama 1969).

JURISDICTION

The judgment of the Supreme Court of Alabama in this case (Appendix A, *infra,* pp. A11) was entered on February 6, 1969.

A timely petition for rehearing was denied on March 6, 1969, (Appendix A, *infra,* p. A13).

The jurisdiction of this Court is invoked under Title 28 U. S. Code, Section 1257 (3).

QUESTIONS PRESENTED

A.

Is an attorney at law in Alabama in a disbarment proceeding, entitled to a trial by jury?

B.

May an attorney at law, consistent with the due process and equal protection clauses of Amendment XIV, Constitution of the United States be proceeded against in a disbarment action where the thrust of the complaint against him is a violation or violations of a rule of conduct of the Board of Commissioners of the State Bar, approved by the Supreme Court of Alabama, which said rule is "contra" to the interpreted statutory law of the State of Alabama?

C.

May an attorney, consistent with the due process and equal protection clauses of Amendment XIV, Constitution of the United States, be regulated, investigated, charged, tried, convicted and punished by the Board of Commissioners of the Alabama State Bar in a proceeding quasi criminal in nature, when said Board of Commissioners maintains no separation of its executive, legislative or judicial powers?

D.

May an attorney, consistent with the due process and equal protection clauses of Amendment XIV, and Amendment VI, Constitution of the United States, be proceeded against in disciplinary proceedings in which his right to be confronted with witnesses against him, is to some extent measured by his own financial resources, and in which he is denied the opportunity to make objections to objectionable testimony offered by witnesses, when the final judgment of punishment to be meted out to him is based upon depositions containing that same evidence by a Board who has not observed any of the witnesses in person?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions, statutes and rules involved are set forth below (Appendix B, *infra,* pp. B1, *et seq.*).

STATEMENT OF THE CASE

The grievance committee of the Alabama Bar Association instituted disbarment proceedings against the petitioner, John Ike Griffith, before the Board of Commissioners of the Alabama State Bar on July 10, 1964, (R. pp. 8-21); amended the complaint on January 15, 1965, (R. pp. 26-47); amended the complaint on May 29, 1966, (R. pp. 259-262); and further amended the complaint on March 30, 1967 (R. pp. 380-382).

The charges against petitioner complained of violations of two rules of the Board of Commissioners of the Alabama State Bar, viz:

RULE 25, SECTION A, as last amended:

25. No person heretofore or hereafter admitted to practice law in Alabama shall,

(a) Knowlingly or wilfully make any false representations of fact to any judge, court or jury to induce a favorable action or ruling by either;

(b) File or prosecute or aid in the filing or proceeding seeking a divorce in a Court in Alabama as attorney or solicitor for a complainant or cross complainant therein or serve as referring or forwarding attorney for such complainant or cross complainant with knowledge or reasonable cause to believe that neither party to such suit, cross bill, or proceeding is at the time of the filing of the bill of complaint or cross bill of complaint therein, a bona fide resident of the State of Alabama;

(c) While acting as attorney for either party in any suit for divorce in any Court in Alabama represent to the Court that either party to such suit is a bona fide resident of Alabama, knowing such representation to be false.

RULE 36, SECTION A, as last amended:
36. No person licensed to practice law in the courts of the State of Alabama shall be guilty of any conduct unbecoming an attorney at law.

The gravamen of the complaint against petitioner was that he:

"***served as referring or forwarding attorney for the complainant wherein the bill of complaint represented (to a court in Alabama) that either the complainant or respondent was a bona fide resident of the State of Alabama, when, in truth and in fact, the said attorney knew or had reasonable cause to believe that in one or more, if not all, of said cases, neither the complainant nor the respondent was a bona fide resident of the State of Alabama." (R. p. 32).

On January 25, 1965, the president of the Board of Commissioners filed with the Secretary of the Alabama

State Bar an order appointing a Commissioner to take testimony in the proceedings. (R. p. 7). On January 26, 1965, the Board of Commissioners of the Alabama State Bar, through representative counsel, filed a notice to take the deposition of petitioner, John Ike Griffith, (R. p. 3); and a subpoena duces tecum directed to John Ike Griffith. (R. p. 5). On February 4, 1965, petitioner John Ike Griffith filed motions to quash the service of notice of taking his deposition. (R. pp. 48-50). (Those matters in the record relating to the Board of Commissioners' attempt to compel petitioner John Ike Griffith to testify in said proceedings were finally disposed of by this Court's decision in *Spevack v. Klein,* 385 U. S. 511, 87 S. Ct. 625, 17 L Ed 2d 574, decided during the progress of these proceedings.) On the same day petitioner filed a Motion to Quash directed to the original complaint filed against him by the Board of Commissioners of the Alabama State Bar, (R. pp. 52-76), and his demand for a jury trial. (R. p. 76). In said motion petitioner at the first opportunity raised the constitutional issues presented here as follows, in part:

> "12. For that the bringing of the accused to trial under the statute relied upon and by the charges set forth deprives him of his rights as a citizen of the United States and of the State of Alabama granted by the 6th and 14th Amendments to the Constitution of the United States.
>
> 13. For that the proceeding is void in that it does not provide for a trial by jury of the issues alleged, and violation of the rights of the accused attorney under the Constitutions of the State of Alabama and of the United States.
>
> 14. For that the charges are so indefinite, vague, uncertain and informal as to lack the essentials of due process of law.
>
> 18. For that Section B, Rule 18, making the "opinion" of the Board the sole measure of the relevancy, materiality or competency of testimony sets up a standard for testimony so indefinite, unascertainable and subject to change that the accused attorney is denied a trial ac-

cording him due process and equal protection of the laws as guaranteed to him by the Constitutions of the State of Alabama and the United States.

41. For that the rule the respondent is charged with violating is void and unconstitutional, and beyond the power of the Board of Commissioners to make and enforce for that it seeks to impose upon attorneys practicing in the field of divorce law the burden of insuring or presenting at his own jeopardy the testimony of every witness in any case in which he appears, whether a solicitor for complainant or respondent, and whether the witness is his own or otherwise, as to the jurisdictional requirements of residents and said duty of burden is imposed only upon an attorney practicing divorce law and handling a divorce case and is not made applicable to any other field of the law, or the practice of law generally.

88. For that the act of the legislature depriving the respondent of the right to trial by jury and disbarment proceedings is contrary to the Constitution of the United States and the Constitution of Alabama and is void.

94. The act of the legislature creating a Board of Commissioners and empowering said Board to legislate or pass rules of conduct, to investigate and charge attorneys with violation of said rules, and to try and punish attorneys for violation of said rules is contrary to the Constitutions of the State of Alabama and the United States and is void in that it violates constitutional requirements for operation of the legislative, judicial and administrative branchs of government combining the powers of all into one."

DEMAND FOR JURY TRIAL

Comes now the respondent, John Ike Griffith, acting by and through his attorney, and respectively demands a trial by jury of all the issues of fact in this cause which were triable by jury under the provisions of the Constitution of the United States of America and the Constitution of Alabama and the Law of Alabama."

No ruling was ever made on said Motion to Quash on its merits by the Commissioner appointed to take testimony. Proceedings were had intermittently thereafter before said Commissioner in Birmingham, Jefferson County, Alabama and by deposition before notaries public in Patterson, New Jersey (R. 330-349) and Auburn, New York (R. 296-304), through May 5, 1967. The testimony was then submitted to the full Board of Commissioners of the Alabama State Bar in the form of a typed record of the proceedings.

The proceedings before the full Board of Commissioners were held in Montgomery, Alabama. On July 11, 1967, petitioner John Ike Griffith filed a Plea in Abatement (R. p. 476-477) attacking the new venue of the proceedings as follows in part:

> "3. That respondent, John Ike Griffith, has a constitutional right to have these proceedings conducted in Jefferson County, Alabama, where he resides.
>
> 5. That the respondent, John Ike Griffith, has not waived his constitutional right to insist that he be tried on the charges now pending against him in the county where he resides, to-wit: Jefferson County, Alabama."

Simultaneously therewith, the petitioner John Ike Griffith filed a new motion to quash the complaints, accusations, and charges as amended theretofore filed against him on July 10, 1964, and as amended on January 15, 1965, May 29, 1966, and March 30, 1967, (R. pp. 478-501) and demanded a trial by jury. (R. p. 501).

Again at this state of the proceedings petitioner raised and preserved the constitutional questions now presented to this Court by motion to quash in the following manner, in part:

> "8. For that the rule of the Supreme Court, under which this prosecution is brought, is in conflict with and is void as against the provisions of the statutory law of the State of Alabama; namely Title 34, Section 29, Code of 1940, as amended.
>
> 9. For that the complaints do not sufficiently inform the accused attorney as to the charges made against him

in order for said charges to comply with the requirements of due process of law.

13. For that the proceeding is void in that it does not provide for a trial by jury of the issues alleged, and violation of the rights of the accused attorney under the Constitutions of the State of Alabama and of the United States.

17. For that Section B, Rule 18, of the rules governing the conduct of attorneys in Alabama, making the "opinion" of the Board effective measure of the relevancy, materiality or competency of testimony, does not provide for a hearing on testimony taken in keeping with due process of law.

42. For that the rule the respondent is charged with violating is void and unconstitutional, and beyond the power of the Board of Commissioners to make and enforce for that it seeks to impose upon attorneys practicing in the field of domestic relations the burden of insuring or presenting at his own jeopardy the testimony of every witness in any case in which he appears, whether a solicitor for complainant or respondent, and whether the witness is his own or otherwise, as to the jurisdictional requirements of residence and said duty or burden is imposed only upon an attorney practicing divorce law and handling a divorce case and is not made applicable to any other field of law, or to the practice of law generally.

89. For that the act of the legislature depriving the respondent of the right to trial by jury in disbarment proceedings is contrary to the Constitution of the United States and to the Constitution of Alabama and is void.

DEMAND FOR JURY TRIAL

Comes now the respondent, John Ike Griffith, acting by and through his attorney, McCullough & McCullough, and respectively demands trial by jury of all the issues of fact in this cause which are triable by a

jury under the provisions of the Constitution of the United States of America and the Constitution of Alabama."

No responsive pleading was filed by the Board of Commissioners to the aforementioned Plea in Abatement and Motion to Quash filed by petitioner John Ike Griffith.

On July 19, 1967, a special meeting of the Board of Commissioners of the Alabama State Bar was held at the State Bar Headquarters in Montgomery, Alabama. At the conclusion of the arguments by counsel for the respective parties the Motion to Quash and Plea in Abatement filed by petitioner were overruled and the above quoted resolution of disbarment of petitioner was adopted by the Board of Commissioners.

Petitioner John Ike Griffith thereafter sought review in the Supreme Court of Alabama of the resolution of disbarment adopted by the Board of Bar Commissioners. The opinion and judgment of the Supreme Court of Alabama affirming the resolution of disbarment was entered on February 6, 1969, (Appendix A pp. A1-A10). Thereafter a timely application for rehearing was denied without opinion by the Supreme Court of Alabama on March 6, 1969 (Appendix A, pp. 13).

REASONS FOR GRANTING THE WRIT

Question A

The right of an attorney in Alabama to a trial by jury in disbarment proceedings was guaranteed to him by law before Alabama became a State. "'Toulmin's Digest of the Laws of Alabama," p. 22. This provision for a jury trial for attorneys in disbarment proceedings remained in the law of Alabama until adoption of the 1923 Code of Alabama when the Alabama legislature created the integrated Bar in Alabama and created the disciplinary procedures presently used in Alabama. The 1923 Alabama Code deleted the statutory provision respecting jury trials in disbarment proceedings. During this period the Alabama Consti-

tution of 1901 was adopted. Article 1, Section 11 of the Constitution of 1901 provides as follows:

"That the right of trial by jury shall remain inviolate."

This attempt by the State of Alabama through its legislative arm to remove said right of trial by jury from the law of Alabama, which was a pre-existing right, amounts to a denial by the State of Alabama, through its legislative arm, of due process to petitioner and is an abridgment by the State of Alabama of a pre-eyisting right of petition in violation of Amendment XIV, Constitution of the United States.

Petitioner raised this question at his first opportunity. (R. pp. 76, 77).

In its opinion (Appendix A, pp. A1-A10), the Supreme Court of Alabama disposed of petitioners contention that he was entitled to a trial by jury by reaffirming its previous declaration on the point in *Ex Parte Thompson,* 228 Ala. 113, 152 So. 229, where it was held:

"***That the courts have the inherent power to suspend or to remove attorneys without trial by jury.***"

Petitioner recognizes the inherent power of courts to discipline attorneys generally but submits that such is not the case in a jurisdiction such as Alabama where the right to a trial by a jury was granted by statutory enactment to attorneys and subsequently guaranteed to them Article 1, Section 11, Alabama Constitution 1901 as above quoted.

The Alabama Supreme Court in *Ex Parte Thompson,* supra, held that Article I, Section II of the Alabama Constitution of 1901 did not apply to all statutory law existing at the time of the adoption of the Constitution; but only to those cases in which a litigant would have been entitled to a trial by jury at common law.

Petitioner submits that the denial to him of a trial by jury is not consistent with due process, and equal protection provisions of Amendment XIV, Constitution of the United States.

Question B

Title 34, Section 27, Code of Alabama, 1940, as amended, (Appendix B, *infra,* p. B2); and Title 34, Section 29, Code of Alabama, as amended, (Appendix B, *infra,* p. B2) have been interpreted by the Supreme Court of Alabama in *Levy v. Levy,* 256, Ala. 629, 59 So. 2d 344 and *Hilley v. Hilley,* 275 Ala. 617, 157 So. 2d 215, to require no particular or specific period of residence in Alabama of a complainant in a divorce proceeding where the the respondent is a non-resident when the Court has jurisdiction over both parties to the cause of action, the only jurisdictional requirement being that the complainant be domiciled in the State of Alabama in order to confer upon the Court jurisdiction over the "res.". In accord with such interpretation, the Supreme Court of Alabama has refused to set aside a decree of divorce where one of the parties thereto objected. *Aiello v. Aiello,* 272 Ala. 505, 133 So. 2d 18. Rule 25 of the Board of Commissioners of the Alabama State Bar (Appendix B, *infra,* p. B6) is, therefore, causing conduct of an attorney in procuring divorces, unless he is capable of probing the mental operations of his client and thereby ascertaining his true intentions as to future indefinite residence in the State of Alabama, to be demoninated unethical and to subject himself to disciplinary proceedings and disbarment, even though the decree of divorce he has obtained for his client is valid for all intents and purposes under the applicable statutory provisions. This burden is not placed upon attorneys practicing in other fields in Alabama, nor is it placed upon the practice of law generally. Petitioner submits that this clearly violates his rights guaranteed by the due process and equal protection clauses of Amendment XIV, Constitution of the United States.

Question C

The Board of Bar Commissioners of the Alabama State Bar exercises its administrative, legislative and judicial powers in the performance of its duties, as outlined by the legislature of the State of Alabama in Title 46, Section 25, Code of Alabama, 1940, (Appendix B, *infra,* pp. B2).

The Board of Bar Commissioners of the Alabama State Bar is unconstitutionally composed because it is established in violation of the doctrine of separation of powers, and in further violation of other state and federal constitutional provisions.

Article 6, Section 139, of the Constitution of Alabama, 1901, provides:

> "The judicial power of the state shall be vested in the Senate sitting as a Court of Impeachment, a Supreme Court, Circuit Courts, Chancery Courts, Courts of Probate, such courts of law and equity inferior to the Supreme Court, and to consist of not more than five members, as the legislature from time to time may establish, and such persons as may be by law invested with powers of a judicial nature . . ."

Article 3, Section 42, Constitution of Alabama, 1901, provides:

> "The powers of the government of the State of Alabama shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to-wit: those which are legislative, to one; those which are executive, to another; and those which are judicial, to another."

Article 3, Section 43, Constitution of Alabama, 1901, provides:

> "In the government of this state, except in the instances in this constitution hereinafter expressly directed or permitted, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise and legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that this may be a government of laws and not of men."

The Supreme Court of Alabama in its opinion (Appendix A, pp. A1-10) relied on *Ex parte Thompson,* 228

Ala. 113, 152 So., 229, in holding that the legislature acted within constitutional bounds in its creation of the Board of Commissioners of the Alabama State Bar, and the grant of powers to it. The Alabama Supreme Court relied upon the last phrase quoted above in Article VI, Section 139 of the Constitution of Alabama 1901 as finding expressed constitutional warrant for confering judicial functions upon the Boad. No comment was made about the executive and legislative functions of the Board save that the act creating the Board of Commissioners of the Alabama State Bar transgressed no constitutional grounds.

The legislative, executive and judicial authority is exercised concurrently and to the same end, as in the case in the instant proceeding, the constitutional provisions relating to separation of powers become of paramount importance.

It is axiomatic that an act or law may be constitutional on its face, yet unconstitutional in its application.

In practice, the Board of Commissioners of the Alabama State Bar is an autonomous and plenary organ of the State of Alabama in dealing with the members of the Bar. The Board of Commissioners, subject to approval by the Supreme Court of Alabama, promulgate the rules governing conduct of attorneys, a clearly legislative function; they can carry out provisions for the implementation of said rules, clearly an executive function; investigate, prosecute, deliberate, and pass judgment against any member of the Bar charged with a breach of the provision so promulgated. Title 46, Section 25, Code of Alabama 1940, grants disciplinary power to the Board, the scope of such power extending from reprimand to the supreme punishment of disbarment; and this without the intervention of the Supreme Court of Alabama, save for its approval of the regulations promulgated by the Commissioners. Review by the Supreme Court of Alabama on the decision of the Board is not mandatory, and that Court can act only on petition of the agrieved attorney, or ex mero motu. Therefore, the Board sits as a law maker, prosecutor, judge, jury, and executioner all at the same time. Petitioner submits that this is defacto and abuse of the separation of powers doctrine advanced by the above quoted constitutional provisions, and by the

Constitution of the United States, and in effect is a substantial deprivation of substantive and procedual due process to petitioner in the instant action.

Question D

The Supreme Court of Alabama in *Ex parte Messer,* 228 Ala. 16, 152 So. 244, has denominated disbarment proceedings as quasi criminal in nature. The opinion in *Messer* further set forth:

> "The rules governing the admissibility of evidence and the tests of its revelancy are the same in civil actions and criminal prosecutions, that is, whether the testimony offered induces to the proof of a pertinent hypothesis, which, if sustained, will influence the issue."

Thus, in disbarment proceedings, which are quasi criminal in nature, the same rules of evidence obtain as if the cases were either civil or criminal in nature. In the instant case, petitioner was deprived of the benefit of the rules of evidence whether under a civil or criminal standard, by the absolute impotence of any of his objections and of the refusal of the Commissioner to rule on them on the grounds that he had no power to do so. (R. p. 146). As a result, illegal and irrelevent testimony was introduced which was highly prejudicial to petitioner and scandalous in nature, and could not but influence the outcome of the hearings adversely to the petitioner.

Due process of law has been defined as "fair play and substantial justice" *International Shoe Company v. Washington,* 326, U. S. 310, 66 S. Ct. 154, and in no wise can the hearing accorded petitioner be construed to comply with the standards of fair play and substantial justice. The testimony of James V. Mecelli (R. pp. 175-209), the deposition of Linda Bowden, (R. pp. 296-304), and the testimony of Janet Dasher, (R. pp. 388-447), are replete with heresay, conclusions, uncommunicated mental operations, and other illegal evidence to which petitioner timely objected; but which was entered into the record over petitioner's objection and request that a ruling be made, which ruling was not made.

Petitioner submits that in a blanket reception of all evidence offered to the Commissioners and the fact that none of the witnesses appeared before the Board he was deprived of procedural and substantive due process and denied the equal protection of the law, which rights are guaranteed by Amendment VI and Amendment XIV, Constitution of the United States and by Article I, Section 6, Alabama Constitution of 1901.

In answer to these contentions the Supreme Court of Alabama in its opinion stated as follows:

> "Petitioner next urges a reversal in that "illegal and improper evidence was admitted and must be presumed considered." Rule 18, Section B, of the "amended rules governing the conduct of attorneys in Alabama," provides:
>
> "In the taking of testimony by the grievance committee of the Board or by a Commissioner, as herein provided, or by the Board, it shall not be required or necessary that objection be made to any evidence which may be offered by either party, but the Board shall consider only such evidence as is, in its opinion, relevant, material, or competent and it shall not consider any testimony which, in its opinion, is irrelevent, immaterial or incompetent."
>
> ". . . the rule is established where there is no specific ruling on competency of evidence, as in the case before us, this Court will presume that the Board considered only competent evidence, and that irrelevant, incompetent or immaterial evidence was disregarded. On this review we so limit ourselves."

The petitioner was therefore told by the Alabama Supreme Court that since its specified rules did not allow him the right in a disbarment proceeding to have irrelevant, incompetent and illegal evidence excluded from the record—the very record that was submitted to the Board of Commissioners who had not observed any witnesses personally during their testimony—to decide the fate of petitioner as a practicing attorney in the State of Alabama, now also

precluded the Supreme Court of Alabama from ruling on said evidence because there had been no specific rulings on competency made by the Commissioner or the Board.

It is manifestly unfair to deny this right to petitioner when it is accorded to every legitant in a civil action, and to every defendant in a criminal action. It can scarcely be said that because the instant action is neither criminal nor civil that petitioner is entitled to no procedural safeguards.

The procedural devices employed by the Board are clearly contra to those doctrines enunciated in *Berger v. California,* __ U. S. __, 21 L ed 2d 508, 89 S. Ct. ___ and *Pointer v. State of Texas,* 380 U. S. 400, 13 L ed 2d 923, 85 S. Ct. 1065, with respect to confrontation of witnesses before the Board which passed judgment in some instances.

In this proceeding below testimony was taken by depositions outside the State of Alabama (R. pp. 296-304), (R. pp. 330-349), and petitioner's right to attend the taking of said deposition and to have an opportunity to examine the witnesses was governed solely by his own financial ability to travel to that distant location.

The Board of Commissioners of the Alabama State Bar which handed down the supreme punishment of disbarment to petitioner did not hear the testimony in person of any witness in the proceeding, nor did it have the opportunity to observe the demeanor of any witness. Its final judgment of disbarment was based solely upon the depositions of said witnesses which contained highly prejudicial testimony and had been taken without giving petitioner the right to object to any questions or forms of questions propounded to said witnesses; or to have stricken for proper cause any immaterial, irrelevant or illegal testimony contained therein.

Petitioner submits that this constituted a denial of due process and equal protection to him and denied to him a fair hearing within the meaning of Amendment XIV, Constitution of the United States.

CONCLUSION

For the reasons above stated, it is respectfully submitted that the petition for writ of certiorari in this case should be granted.

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